United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL 74-2159

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COMPAGNIE GENERALE TRANSATLANTIQUE,

Plaintiff-Appellant,

-against-

Docket No.
74-2159

UNITED STATES OF AMERICA,

Defendant and Third Party
Plaintiff-Appellant,

-against-

RED STAR TOWING & TRANSPORTATION CO., INC. and TRACY TOWING LINE, INC. and BRONX TOWING LINE CO., in personam,

and

Tugs KATHLEEN TRACY and BRONX 4, their engines, tackle, etc., in rem,

Third-Party Defendants-
Appellees.

On appeal from the United States District Court Southern District of New York

BRIEF FOR THIRD-PARTY DEFENDANT-APPELLEE, RED STAR TOWING and TRANSPORTATION COMPANY

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STATEMENT OF ISSUES

The District Court found that the negligence of the USS RALEIGH owned by the Defendant and Third Party Plaintiff-Appellant, United States of America, hereinafter referred to as the Government, was beyond dispute. It characterized the commands of the Navy pilot, Edward Fitzgerald, in charge of the navigation of the USS RALEIGH, as "erratic and seemingly thoughtless". The District Court carefully considered whether the tug BRONX 4, owned by Third-Party Defendant-Appellee,

Bronx Towing Line Co., hereinafter referred to as Bronx, was also responsible for the collision and concluded on the basis of the factual evidence that it was not. It found that the BRONX 4 evidenced good seamanship and concern for the lives of the crew of the tug when it backed away from the side of the RALEIGH to prevent being crushed between the RALEIGH and plaintiff-appellant's vessel, the SS FRANCE. It also concluded that if the BRONX 4 did not put a mooring line on the RALEIGH, as allegedly directed by the pilot, it was impossible for the tug to properly tie onto the RALEIGH because of the "carefree way that the RALEIGH was undocked and the fact that she remained underway at all times during the operation ..."

Despite the careful consideration given by the District Court to the issue of liability on the part of the BRONX 4, the Government chooses to ignore the District Court's findings and presents as its first issue the contention that the District Court erred in finding the tug BRONX 4 free of negligence in the performance of its duties.

The second issue presented by the Government, is whether Third-Party Defendant-Appellee, Red Star Towing and Transportation Company, hereinafter referred to as Red Star, breached a warranty* of workmanlike performance

*A warranty if any is owed by Red Star to the Government but not to plaintiff who avers in its Statement in lieu of Brief, that it only takes issue with the District Court's failure to find the BRONX 4 negligent.

of its tug assistance contract with the Government. Although the Government alleged breach of warranty in its pleading, its only argument to the District Court was that the collision resulted solely from negligence on the part of the BRONX 4. Furthermore, the basis for the breach of warranty by Red Star is the performance of the BRONX 4. The Government contends that even if the BRONX 4 was not negligent its performance was such as to constitute breach of warranty by Red Star. We contend that the District Court decided, in effect,that the performance of the BRONX 4, whether negligent or not, had nothing to do with the collision. Furthermore, even if Red Star breached a warranty because of the performance of the tug BRONX 4, Red Star, by reason of its cross-claim against Bronx, could recover over against Bronx as the primarily liable party or Bronx could be directly liable to the Government for breach of warranty. Todd Shipyards Corp. v. Moran Towing & Transp. Co. (2 Cir., 1957) 247 F. 2d 626 at p. 628. Fairmont Shipping Corp. v. Chevron International Oil Co. (2 Cir., 1975) ___F 2d____, decided February 4, 1975. Furthermore, it appears that the written contract between Red Star and the Government provided that Red Star would only be liable for negligence.

STATEMENT OF THE FACTS

The facts of this case have been supplied by the depositions of Captain Wilder, Commanding Officer of the

USS RALEIGH, William O'Leary, Master of the tug KATHLEEN TRACY, and Mervine Steen and George McGuirk, Master and Mate respectively of the tug BRONX 4. A statement by Navy pilot, Edward Fitzgerald, now deceased, was also admitted into evidence (22a-24a).*

According to pilot Fitzgerald's statement,he directed the tug KATHLEEN TRACY to the starboard bow of the USS RALEIGH where she was to "get head on to the starboard bow of the RALEIGH before leaving pier 90. To get two lines up on the starboard bow of the RALEIGH and work slow ahead." According to the testimony of William O'Leary he was never directed to get head on to the starboard bow of the RALEIGH by the pilot but was directed to position the tug alongside and parallel to the starboard bow of the RALEIGH (O'Learydeposition, p. 14-15). Both Fitzgerald and O'Leary admitted that they communicated with each other by radio telephone. O'Leary testified that they communicated on Channel 13 (O'Leary deposition p. 7, 31). According to Fitzgerald the KATHLEEN TRACY was not able to work under the starboard bow of the RALEIGH because of the latter's overhang. O'Leary agrees that he was unable to work alongside under the overhang but he could have worked head on to the starboard bow of the

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* References are to Appellant's Appendix unless otherwise indicated.

RALEIGH if he had been so instructed and, in fact, he did get on the starboard bow after the collision and pushed the RALEIGH into her berth (O'Leary deposition p. 26-28). In any event, the KATHLEEN TRACY was ordered away from the starboard bow and the BRONX 4 was assigned to this position.

Pilot Fitzgerald states that he did not become aware that the KATHLEEN TRACY would not work on the starboard bow until the RALEIGH had only two of her six mooring lines still secured to the pier. This was clearly the fault of the pilot who, admittedly had radio communication with the KATHLEEN TRACY, and yet allowed four of his mooring lines to be released without first determining whether the KATHLEEN TRACY was in position on the starboard bow with two lines up to the RALEIGH and working slow ahead as he ordered.

Pilot Fitzgerald admitted that he left the pier without any tugs although he was aware that the KATHLEEN TRACY was not on the starboard bow when the RALEIGH still had two lines secured to the pier. Captain Wilder testified that the RALEIGH could have remained alongside the pier until a tug was in position on the starboard bow of the RALEIGH (Wilder deposition p. 90-91).

Thereafter and when communication between Pilot Fitzgerald and the BRONX 4 was by means of whistle signals the pilot ordered the BRONX 4 to push

on the starboard bow of the RALEIGH. According to Captain Wilder, the BRONX 4 acknowledged this order and began to push (28a; Wilder deposition p. 11, 95). Wilder did not know whether the tug had a line up to the RALEIGH at this time (Wilder deposition p. 52) but at any rate the tug appeared to be pushing the RALEIGH around nicely (28a: Wilder deposition p. 11). Then Wilder observed the tug BRONX 4 leaving the RALEIGH. The pilot ordered the tug back and the tug again assumed a position on the starboard bow of the RALEIGH (28a; Wilder deposition p. 11). According to Captain Steen and Mate McGuirk of the BRONX 4 their tug was not able to get in position on the starboard bow of the RALEIGH because of the speed of the vessel(36a: Steen deposition p. 28-30, 36; McGuirk deposition p. 9-10, 22, 32-34,38).

Wilder testified that when the BRONX 4 came back to the starboard bow of the RALEIGH, the pilot gave a four blast whistle signal to the tug which was an order to the tug to come full ahead. Wilder heard the whistle acknowledgment by the tug but it appeared to him that the tug was not pushing as directed (29a). Captain Steen on the BRONX testified that he did receive and acknowledge this order but he contends that the tug did start to push effectively (Steen deposition p. 15-16). According to Wilder, the pilot sounded a

a second four blast signal directing the tug to push full ahead and received an acknowledgment (29a; Wilder deposition p. 12). Captain Steen acknowledges this second order but disagrees with Captain Wilder who said that the second order was given because the BRONX 4 did not carry out the first order (Steen deposition p. 15-16). In connection with the second order, Wilder observed the BRONX 4 to be pushing at an approximate 70° angle and was doing nicely for about 15 seconds. Then the tug let her line go from the tug and backed away from the RALEIGH. Wilder estimates that the tug moved away less than one minute before the collision (29a-30a; Wilder deposition p. 12-13). Steen testified that he let go of the line after the tug and FRANCE were in contact with each other and just before the RALEIGH and FRANCE were in contact (Steen deposition p. 16-20).

Steen and McGuirk's version of the facts were somewhat different. Each claimed to have been the master of the tug. However, McGuirk had left Bronx Towing Line almost seven years before he was deposed and was not aware of the lawsuit until almost seven years after it occurred (32a; McGuirk deposition p. 4, 18-19). His memory must have been hazy. Steen claimed that he

came on watch and took over the navigation of the tug when the tug was alongside the starboard bow of the RALEIGH without a line and that he, Steen, moved the tug further aft where he secured a line to a bollard on the starboard side of the RALEIGH. McGuirk claims that he moved the tug aft and secured the tug line to the bollard. McGuirk then concluded that everything was okay when Steen relieved him. In spite of their conflicting versions of the facts both are in complete accord that the only reason the tug could not get under the overhang at the starboard bow of the RALEIGH was that the RALEIGH was going too fast. As the District Court found,"the carefree way that the RALEIGH was undocked and the fact that she remained underway at all times during the operation, made it impossible for the tug to properly tie onto the ship."

Captain Wilder testified and the District Court found that while the RALEIGH was heading into the slip between the south side of Pier 90 and the north side of Pier 88, at 1203 hours, the pilot ordered the RALEIGH's port engine ahead two-thirds and right full rudder (17a; Wilder deposition p. 29). In a twin screw vessel such as the RALEIGH, placing the port engine ahead will tend to turn the vessel ahead to starboard (Trial Minutes p.31). Consequently, the combination of port engine ahead and right full rudder worked together to increase the turn of the RALEIGH to starboard towards the FRANCE. At the time that this engine order and rudder order were given, the

pilot also directed the BRONX 4 to push full ahead on the starboard bow. It was this order that the tug complied with (17a; Wilder deposition p. 81). The rudder was brought amidship at 1204 hours because, as Captain Wilder testified "the bow was not swinging away from the FRANCE" (17a; Wilder deposition p. 31). Also at 1205 hours, the pilot ordered left 20° and left full rudder in order, as Wilder testified, "to move this bow away from the FRANCE"(17a; Wilder deposition p. 31). However, pilot Fitzgerald did not stop the port engine until 1205 hours, but after the left rudder order. The collision occurred at 1206 hours (17a; Quartermaster's Notebook, page 76, which was marked as Exhibit 2 at the Wilder deposition).

Captain Wilder, in his statement, which was marked as Bronx Exhibit No. 1 at the Wilder deposition, expressed his concern that the pilot left the port engine ahead too long thereby delaying the RALEIGH's return to the left. Although the steering wheel was turned 20° to the left and then left full rudder, the ahead thrust on the port engine delayed the desired effect of turning the vessel to the left. Captain Wilder became very anxious and reminded the pilot about the port engine being ahead. Wilder was just about to relieve the pilot of command when the latter ordered the port engine stopped and "corrected it to backfull". (Emphasis ours). As Captain Wilder said "port engine backfull was the order I had in mind and I wanted it to be applied as quickly as possible."

Wilder testified that if the port engine ahead order to the RALEIGH was changed the rate of turn to the left would have been accelerated after the engine had time to take effect (Wilder deposition p. 86-87).

The District Court was clearly impressed by this testimony which it recited in its opinion in support of its conclusion that the negligence of the RALEIGH was beyond dispute (17a-18a).

ARGUMENT

POINT I

THE DISTRICT COURT CORRECTLY HELD THAT THE GOVERNMENT's NEGLIGENCE WAS BEYOND DISPUTE AND THERE WAS NO NEGLIGENCE ON THE PART OF THE TUG BRONX 4

Expert witnesses Merrill and Gadow testified that the tug BRONX 4 should have been made up with a mooring line in position on the RALEIGH's starboard bow before the RALEIGH left her berth and proceeded into the slip (Trial Minutes p. 54, 72). The reason is evident. Even if the tug is not needed to leave the berth, the tug should be in position as soon as possible so that she can respond immediately to the first order from the pilot. Pilot Fitzgerald recognized the importance of positioning the tug immediately because his first order to the KATHLEEN TRACY was to get head on to the starboard bow before the RALEIGH left the berth. Fitzgerald was clearly negligent in failing to position the BRONX 4, which he could have done before the RALEIGH left her berth.

Fitzgerald was also negligent for attempting to position the Bronx tug on the starboard bow when the RALEIGH was moving too fast. The District Court accepted the testimony of the BRONX 4 that the movement of the RALEIGH made it impossible for the tug to properly tie onto the RALEIGH (19a).

Fitzgerald was also negligent for giving orders to the BRONX 4 in the first place without having determined, as he was required to do, that the tug was in position ready to work. The Government's expert witness, Stillwaggon, testified that the tug must be in position before the pilot gives orders (Trial Minutes p. 23-24).

Both Merrill and Gadow testified that because of the presence of the SS FRANCE in the slip there should have been a second tug positioned on the port quarter of the RALEIGH as she entered the slip (Trial Minutes p. 56-57,72-73). Steen, on the BRONX 4, thought that a second tug was on the port quarter and felt that it was needed (Steen deposition p. 36-37). Captain Wilder testified that pilot Fitzgerald planned to have a tug on the starboard bow, another one standing by aft, if needed, and the third tug shifting camels (16a; Wilder deposition p. 27). Pilot Fitzgerald had a third tug available but negligently chose not to use it on the port quarter.

The slip area was only 400-450 ft. wide. The FRANCE was 140 ft. wide, the RALEIGH was 82 ft. wide and the tug BRONX 4 was 24 ft. wide (26a;37a; Trial

Minutes p. 29-30; Wilder deposition p. 5; Steen deposition p. 4). Consequently the widths of these vessels took up more than half of the slip area. It is no wonder that Merrill and Gadow thought that a second tug was needed. It is clear that the margin for error was ever so slight. Expert Merrill said that Moran, Red Star and McAllister, who perform the majority of docking work in New York Harbor, always use two tugs for docking"where there is another ship in the slip like that "(Trial Minutes p. 56). Stillwaggon's disagreement is merely reflecting his close personal relationship with pilot Fitzgerald (Trial Minutes p. 15, 35-36,38).

Another element of negligence on the part of pilot Fitzgerald, cited by the District Court, was the port ahead engine order given by pilot Fitzgerald which was maintained between 1203 hours and 1205 hours. The collision occurred at 1206 hours. Captain Wilder explained that, although the original order might have been advisable, it became necessary to remove the starboard heading and bring the vessel to the left so that her bow would move away from the RALEIGH. Wilder thought that, to make theleft rudder orders effective, the port engine should have been stopped sooner than it was.

The District Court applied the proper legal standard in concluding that the Government was negligent and the tug BRONX 4 was not negligent. Consequently, the decision, which reflects the considered judgment of the District Court based on all the evidence in the case,

must stand.

POINT II

RED STAR DID NOT BREACH A WARRANTY OF WORKMANLIKE PERFORMANCE OF ITS TUG ASSISTANCE CONTRACT WITH THE GOVERNMENT.

Red Star had a written contract with the Government (Exhibit 10 at Wilder deposition). This contract provided, in part, in Section 5.0 IV, entitled "Liability" as follows:

"C. The Contractor shall be liable for loss or damage to...vessels... which is caused by or results from the negligent, wrongful act or omission of his agents, servants or employees, or through the fault of vessels, gear or equipment supplied by him..."

If the above language defines the extent of Red Star's warranty to the Government, it would require negligence on the part of Red Star or the tug BRONX 4 for Red Star to breach the warranty. As stated in Point I of this brief, the District Court correctly held that the negligence of the Government was the sole cause of the collision. Consequently, Red Star could not have breached its warranty.

Assuming however, that Red Star impliedly warranted a workmanlike performance of its towage services, the Government, in Point II of its brief, alleges three instances in which this warranty was breached, which shall be

considered separately as follows:

1) It is alleged that the tug BRONX 4 was operated negligently. In reply to this contention, see Point I of this brief which discusses the absence of such negligence and the fault of the Government.

2) Under the decision of this Court in Fairmont Shipping Corp. v. Chevron International Oil Co.(2Cir., 1975)_____F 2d_____decided February 4, 1975, it is alleged that Red Star could have breached its warranty of workmanlike performance even though the tug BRONX 4 was not negligent. The Government suggests that the breach could occur if the performance of the tug BRONX 4 lacked that degree of skill and judgment possessed by the towing community in general. However, the Government fails to point out that the District Court, in the subject case, considered in detail the performance of the tug BRONX 4 and concluded that the tug BRONX 4 was not responsible for the damage to the SS FRANCE, it displayed good seamanship and concern for the lives of the crew of the tug when it backed away from the RALEIGH to avoid being crushed and the actions of the Navy pilot made it impossible for the tug to properly tie onto the ship. Although the decision in the Fairmont case stands for the proposition that a warranty of workmanlike performance may be breached by non-negligent as well as by negligent conduct, the fact of

the matter is that, in the Fairmont case, there was a finding of a causal connection between the failure of the tugs to make fast to the steamship WESTERN EAGLE and the damage to the WESTERN EAGLE. As applied to the subject case, the District Court found, in effect, that the actions of the tug BRONX 4, whether negligent or not, did not cause or contribute to the damage to the SS FRANCE. Furthermore, since the BRONX 4 did not cause or contribute to the collision, the Government's Point III that negligence of the Government would not preclude indemnity for breach of warranty is of no consequence. In any event, the District Court's finding with respect to the negligence of the Government, must clearly be characterized as "active hindrance", which would negate any criticism of the tug BRONX 4.

3) The Government suggests that Red Star breached its warranty by supplying the tug BRONX 4 which, the Government suggests, was not reasonably fit for its intended use, in that the tug encountered difficulty with the overhang or flair of the RALEIGH's bow. This contention is rejected by the Government itself in Point I of its brief at p. 5, where the Government contends that there was a vertical clearance in excess of 7 feet between the highest point of the BRONX 4 and the overhang of the RALEIGH's bow. Furthermore, the Government's own expert

witness, James Stillwaggon testified that the tug BRONX 4 should have been able to get head-on to the starboard bow of the RALEIGH (Trial Minutes p. 9-11). Neither Pilot Fitzgerald nor Captain Wilder had any criticism of the design of the tug (22a-24a; Wilder deposition p. 70-71). Furthermore, witnesses Steen and McGuirk testified that they could have assumed a position on the starboard bow of the RALEIGH but for the speed on the RALEIGH.

Bronx's expert witness, Ralph Merrill, testified that the two-third ahead speed on the port engine of the RALEIGH, at which time the pilot had ordered the BRONX 4 to push, was too fast for the BRONX 4 to get alongside at a 90° angle. He did not criticize the design of the BRONX 4 and did not even suggest that her configuration was not suitable to push under the overhang of the RALEIGH (Trial Minutes 57-58). Red Star's expert witness, Robert Gadow, also testified that the BRONX 4 could get head-on to the RALEIGH if the latter was not proceeding too fast (Trial Minutes p. 72).

In any event, if Red Star is found to have breached its warranty of workmanlike performance by reason of the actions of the tug BRONX 4, Red Star could recover over on its cross-claim against Bronx, the primarily liable party. See Todd Shipyards Corp. v. Moran Towing Transp. Co., (2 Cir. 1957) 247 F 2d 626 at p. 628. Also under the

principle set forth in footnote 12 to this Court's decision in Fairmont Shipping Corp. v. Chevron International Oil Co. (2 Cir. 1975)_____F 2 d _____decided February 4, 1975, Red Star's contract to provide tug service to the Government, imposed on Red Star an obligation to perform in a workmanlike manner and also imposed on Red Star's sub-contractor, Bronx, the same obligation to perform in a workmanlike manner. Consequently, the Government could recover directly from Bronx if its tug BRONX 4 performed such acts which, according to the Government, constituted a breach of workmanlike performance.

CONCLUSION

The judgment of the District Court awarding damages to the plaintiff-appellant against the Government and dismissing the complaint and third-party complaint against third-party defendant-appellee, Red Star Towing and Transportation Company, should be affirmed.

Respectfully submitted,

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